SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967, No. 858

ALBERT W. BAXTER ET AL., *Appellants*,

v.

CITY OF PHILADELPHIA ET AL., *Appellees*

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Pennsylvania entered on June 29, 1967, affirming the judgment entered by the Court of Common Pleas of Philadelphia County, Commonwealth of Pennsylvania, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported in 426 Pa. 240 (infra, p. 33).

Copies of the opinions of the Court of Common Pleas on preliminary objections (infra, p. 19), motion for judgment on the pleadings (infra, p. 23) and the opinion of the Supreme Court of Pennsylvania on appeal from the denial of the motion for judgment (reported in 385 Pa. 424; infra, p. 26) the findings and verdict of the trial judge in the Court of Common Pleas (infra, p. 28) and the opinion of the Court of Common Pleas, sitting en banc (infra, p. 30) dismissing exceptions to the findings of the trial judge are attached hereto in the Appendix.

JURISDICTION

This action of mandamus was brought by the members of the executive board of the Fraternal Order of Police as a class action against the City of Philadelphia and certain of its officers. The judgment of the Supreme Court of Pennsylvania was entered on June 29, 1967 and notice of appeal was filed in that Court and in the Court of Common Pleas of Philadelphia County on September 27, 1967.

The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28, United States Code, sections 1257(2) and 2101(c).

Cases Believed to Sustain Jurisdiction

1. *Invalid Delegation of Legislative Power.*

In *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446, it was held that any legislative enactment which vests in a person or body of persons free of any standards independent of his or their own mind and judgment, the power of supplying or giving force to or suspending its terms is unconstitutional as a delegation of the power exclusively in the legislature.

In creating an administrative agency, the legislature must enjoin upon it a certain course of proceeding and certain rules of decision in the performance of its functions in order to prevent a delegation of legislative power. *Roach v. Johnson*, 48 F. Supp. 833, 834, 835. *Wichita R. & Light Co. v. Public Utilities, etc.*, 260 U. S. 48, 43 S. Ct. 51, 55, 67 L. Ed. 124. *Schechter Poultry Corp. v. United States*, 295 U. S. 495.

Neither the enabling act nor the Philadelphia Home Rule Charter prescribed rules for the guidance of the Civil Service Commission. It established no criteria to govern the course of the Commission in issuing the regulations

pertaining to pay and hours of work. It did not require any findings by the Commission as a condition of its action. Neither the enabling act nor the Charter declared any policy as to classification, wages and hours, which are pure legislative functions. The Commission was given unlimited authority to determine the policy as to these important items as the Commission might deem fit.

The general outline of the purposes of the Charter contains nothing as to classification, wages and hours. There is declared no policy of limitation. It is important to note that the Emergency Civil Service Regulations and Supplemental Regulation A were prepared by the Civil Service Committee of the Committee of Seventy, a private civic organization having no official connection with the City or the Commission, and it was this Committee that gave the regulations its "emergency" name weeks before they were put into effect on the effective date of the Charter (Record, pp. 221a-239a).

As stated in *Panama* (p. 418):

> "It is manifest that this broad outline is simply an introduction of the Act, bearing the legislative policy as to particular subjects declared and defined, if at all, by the subsequent sections."

The Home Rule Charter left to the Civil Service Commission, without standard or rule, legislative functions to be dealt with by the Commission as it pleased. It was an attempt to commit the functions of a legislative body rather than those of an executive or administrative officer executing a declared legislative policy. There is nothing in the Charter which limits or controls the authority conferred by Section 7-400 on the Commission.

The legislature cannot abdicate or transfer to others the essential legislative functions with which it is vested. It can, of course, perform its function by laying down policies and establishing standards while leaving to selected instrumentalities the making of subordinate rules within

prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.

What is involved here is the constitutional processes of legislation which are an essential part of our system of government.

The Commission regulations contain no finding, no statement of the grounds for its action in fixing the hours of work and pay. It is clearly the result of unfettered discretion and is therefore invalid. It invests the Civil Service Commission with uncontrolled legislative power.

Due process of law requires that it shall appear that the regulations are within the authority of the Commission and, if that authority depends on determinations of fact, those determinations must be shown by an express finding. In the absence of such finding, the regulations of the Commission with respect to hours and pay is without constitutional authority.

As the Court stated in *Schechter*, the Commission was given "a roving commission" to fix hours of work without any "standard, definite or even approximate, to which legislation must conform." (Mr. Justice Cardozo, concurring opinion, *Schechter* (p. 551-552).) This was an abdication of legislative power. The Commission could not use it as it could not exercise legislative powers.

2. *Violation of Due Process and Equal Protection of the Law Clauses of the 14th Amendment.*

The unfair discrimination by the regulations in requiring the police to work 48 hours while all other city employes worked a 40-hour week, without any plausible and valid basis was arbitrary, capricious and unreasonable. *Healy v. Ratta*, 67 F. 2d 554, reversed on other grounds, 292 U.S. 263.

The Commission can exercise only ministerial powers, not legislative powers. While state and municipal bodies may be limited in scope and may be adjusted to differences in things and situations, it may not make any arbitrary

or unreasonable distinction or discrimination, but must accord substantially equal and uniform treatment to all persons similarly situated. Any distinction must be based on substantial differences. None were shown, found or alluded to by the Commission in requiring policemen to work substantially longer hours than all other city employees. The constitutional inhibitions against such discrimination are too important and valuable to be frittered away in this unrestrained manner. Fairness in classification is still a virtue. *Atlantic Pipe Line Co. v. Brown County*, 12 F. Supp. 642, 646 (D.C. Tex.).

The Commission made no finding and the City presented no evidence to support any valid distinction between policemen and other city employees to warrant discrimination against policemen. If anything, the policemen should be favored. The policemen's lot is not a happy one, particularly in these troubled times. The Court below justifies its position on this discrimination by stating:

> "Government must have broad discretion in adjusting incentives for public employees if it is to compete successfully in the labor market to provide adequately and economically services essential to the public weal." (P. 253 of opinion, Supreme Court of Pennsylvania).

It is difficult to see what incentive it would be to any young man aspiring to be a policeman to realize he would be required to work longer hours at less pay them all other city employees. Its cited authority, *Iben v. Monaca Borough*, 158 Pa. Superior Ct. 46, 43 A. 2d 425 (1945), holds exactly opposite to the professed concern. The practical effect has been that this discrimination in the matter of hours of work and pay has made the recruitment of qualified police officers in Philadelphia a most difficult one.

Class legislation discriminating against some and favoring others is prohibited. Classification must embrace all who belong in the same category and may not be capricious or arbitrary. *Pfeiffer Brewing Co. v. Bowles*, 146

F. 2d 1006 (1945); *McLaughlin v. State of Florida*, 85 S. Ct. 283.

A city policeman is a city employee. In the matter of hours of work, he should not be treated differently than other city employees. Police work is a highly hazardous occupation, with injury or death as a constant companion. The risks are many and the rewards few. Singling out the policemen for this kind of discrimination cannot be justified either legally or morally. A public servant should be entitled to protection under the due process clause where his exclusion from legislative provisions is arbitrary, capricious and unreasonable. *Weiman v. Updegraff*, 344 U.S. 183.

3. *The Regulations Impaired the Obligation of Contract.*

It is a cardinal rule of construction that repeals by implication are not favored and it is presumed that an ordinance or statute has not been repealed. Accordingly, in the absence of an express repealer the indication of an intention to effect a repeal of prior legislation must be clear and compelling. *Parisi v. Phila. Zoning Board*, 393 Pa. 458, 143 A. 2d 360.

Applying these decisions to the ordinances of October 29, 1951 and January 2, 1952, Supplemental Emergency Regulation A as well as the applicable section in the Civil Service Regulations of December 30, 1952 did not effect a repeal of said ordinances.

Supplemental Emergency Regulation A attempted to revive that part of a Council Ordinance relating to hours of work which were validly repealed by the Ordinance of October 29, 1951, as amended by the Ordinance of January 2, 1952. Even assuming the validity of this regulation, which is denied, it could not either amend or revive a dead ordinance provision. *McQuillin, Municipal Corporations*, p. 183, section 21.05.

Where an ordinance is void, and, in legal contemplation, inoperative as though it had never been passed, a later ordinance purporting to amend it likewise is void

and of no effect. *Dean Milk Co. v. Aurora*, 404 Ill. 331, 88 N. E. (2d) 827.

When the 40-hour week ordinance went into effect, the appellants acquired certain contract or vested rights. Since an ordinance cannot impair the obligation of a contract or violate a property or any constitutional right, it follows that the repeal of an ordinance cannot deprive a person of rights acquired under it or prejudice him in those rights and thereby deprive him of his property without due process of law, impair the obligation of his contract, unreasonably discriminate against him and otherwise violate his constitutional rights. *McQuillin, Municipal Corporations*, p. 196, sec. 21.15. See *Johnson v. U.S.*, 39 F. Supp. 208.

The rule against giving statutes retroactive effect is equally applicable to municipal ordinances. *Appeal of Saidey*, 369 Pa. 19, 85 A. 2d 28; *City of Philadelphia, to use of Polselli v. Phillips*, 179 Pa. Superior Ct. 87, 116 A. 2d 243; *Appeal from Ordinances of Neville Twp. No. 388*, 103 P. L. J. 167. (The Court held the repeal of an ordinance ineffective against vested right acquired or any claim arising under repealed ordinance.)

An ordinance may not be declared invalid on the ground that the council adopting it was improperly motivated unless its action was induced by bribery or fraud. It is the result that is controlling. *In re Ordinance No. 203 of Barnsborough Bor.*, 59 Pa. D. & C. 495, 39 Pa. Mun. Law R. 19.

This is the law in virtually every state in the Union. *Ex Parte Finley*, 246 Ala. 218, 20 S. 2d 98; *City of Chicago v. Waters*, 363 Ill. 125, 1 N. E. 2d 396; *American Grocery Co. v. Board of Commissioners of City of New Brunswick*, 124 N. J. L. 293, 11 A. 2d 599; aff. 126 N. J. L. 367, 19 A. 2d 696; *Madison v. City of Maryville*, 173 Tenn. 489, 121 S. W. 2d 540; *People v. Stover*, 240 N. Y. S. 2d 734, 12 N. Y. 2d 462, 191 N. E. 2d 272; *Brairton v. Gillette*, 244 N. Y. S. 2d 513; *State, ex rel. McGonigle v. Madison Circuit Court*, 193 N. E. 2d 242; *Oscar P. Gustafson Co. v. City of Minneapolis*, 42 N. W. 2d 809.

Statutes Involved

Philadelphia Home Rule Charter

Article I, Section 1—100

Article I, Section 1—101

Article III, Section 702 (3)

Article VII, Section 7—400;

Section 7—401 (a) (b) (r)

Article VIII, Section 8-407

Appendix to Charter, Section A-110

Philadelphia Emergency Civil Service Regulations

Regulation XIX

Regulation XXVII, Section 2

Supplemental Regulation A

Civil Service Regulation of December 30, 1952—

Regulation VI, Section 9

Regulation XIX

Constitution of the United States

Article I, Section 10

Amendment XIV, Section 1

Constitution of Commonwealth of Pennsylvania

Article III, Section 7

Philadelphia City Ordinances

October 29, 1951 and January 2, 1952.

Questions Presented

1. Are Regulation XIX of the Philadelphia Emergency Civil Service Regulations, Supplemental Regulation A and Regulation XIX of Civil Service Regulations of December 30, 1952 in violation of due process of law provision of the Fourteenth Amendment of the Constitution of the United States as an attempted exercise of an invalid and unlawful delegation of legislative power?

2. Are Regulation XIX of the Philadelphia Emergency Civil Service Regulations, Supplemental Regulation A and Regulation XIX of Civil Service Regulations of December 30, 1952 in violation of the equal protection of the laws clause of the Fourteenth Amendment of the Constitution of the United States in that it arbitrarily and capriciously discriminated against and required policemen and park police to work longer hours than all other city employees (except firemen) without just and proper compensation?

3. Are Regulation XIX of the Philadelphia Emergency Civil Service Regulations, Supplemental Regulation A and Regulation XIX of Civil Service Regulation of December 30, 1952 in violation of the due process of law provision of the Fourteenth Amendment of the Constitution of the United States in that they impaired the obligation of contract between the police and the City of Philadelphia?

Statement of the Case

This is an action in mandamus to compel the City of Philadelphia and certain officials thereof to reinstate the 40-hour work week for policemen and park police, and to compensate the appellants and all other policemen, park police and policewomen for time worked over 40 hours a week since January 7, 1952. The basis of the amended complaint is an ordinance of City Council approved by the then Mayor of Philadelphia, Bernard Samuel, on October 29, 1951, which ordained that the standard work week of employees of the City of Philadelphia "shall consist of 5 work days." This ordinance was subsequently amended by City Council on January 2, 1952, and likewise approved by Mayor Samuel, which amendment set forth that "on and after January 1, 1952, the standard work week of the employees of the City of Philadelphia, and of the departments, bureaus, boards, commissions and other agencies thereof shall consist of 40 hours of work."

Immediately after the amendment was approved, the appellants and all other policemen, park police and policewomen, who were then working on a 48-hour week, were placed on a 40-hour work week, at an annual salary of $4,000. On January 7, 1952, the Philadelphia Home Rule Charter went into effect and a new administration came into office.

On said date, the appellants were ordered by the Police Commissioner, one of the appellees herein, to return to a 48-hour work week. This action was approved by the other appellees.

This was put into effect by the approval by the Civil Service Commission on January 7, 1952 of Philadelphia Emergency Civil Service regulations and Supplemental Emergency Civil Service Regulation A.

Regulation XIX of the said Philadelphia Emergency Civil Service Regulations provided that "soon after his appointment, the Personal Director shall submit to the

Commission a plan for hours of work, holidays, annual vacation and sick leave, which shall apply in the various classes of positions in the civil service." This regulation also provided that after approval of the plan by the Commission, the plan "shall be submitted to the Administrative Board for final action."

Regulation XXVII, section 2, of the Philadelphia Emergency Civil Service Regulations provided as follows:

> "Section 2. Existing Pay Plan
>
> "Until a pay plan as prescribed in these emergency regulations has been prepared and adopted, the pay plan in effect immediately prior to January 7, 1952 shall operate as the pay plan prescribed in these regulations."

Supplemental Emergency Regulation A provided that: "Commencing January 7, 1952 the hours of work and the rates of pay and the determination of compensation of all city employees shall be as legally established on October 26, 1951. This supersedes section 2 entitled 'Existing Pay Plan' of Regulation XXVII of the Emergency Regulations."

Appellants contended (paragraph 13) that the Emergency Civil Service Regulations and Supplemental Regulation A were prepared and approved at the same time and were vague, inconsistent, contradictory and ineffective to repeal the Ordinances of Council dated October 29, 1951 and January 2, 1952.

Appellants also contended that these regulations were null and void because the advertisements of said regulations failed to give adequate public notice by advertisement of the filing of said regulations and did not adequately inform the public of the particular subjects which were the subject matter of said regulations and did not adequately inform the Appellants of the contents of said regulations.

The amended complaint further averred that the Philadelphia Emergency Civil Service Regulations, Supple-

mental Regulation A, and the civil service regulations of December 30, 1952 were invalid because they were placed into immediate effect on January 7, 1952 and January 1, 1953, respectively, instead of being on file with the Department of Records for a period of 30 days, before going into effect, as required by the Charter, on the ground of the declaration by the Mayor that an emergency existed affecting the public health and safety, when in fact no such emergency existed. (At the trial, appellees offered no evidence as to the existence of an emergency affecting the public health and safety. Appellants offered testimony by the former Director of Public Safety, which had control over the police department, that there was no emergency affecting the public health or safety on January 7, 1952 or January 1, 1953. It was stipulated that certain police officers, present in court, would testify to the same effect.)

The amended complaint averred that Section A-110 of the Appendix to the Philadelphia Home Rule Charter provides: "the provisions in this Charter so far as they are the same as those of existing statutes or ordinances shall be construed as a continuation of such statutes or ordinances and not as new enactments." By reason of this provision, the ordinance of Council of October 29, 1951, and its amendments on January 2, 1952, remained in full force and effect on January 7, 1952, when the Charter went into effect, and the ordinances have never been repealed.

Section 3-702(3) of the Philadelphia Home Rule Charter provides:

> "Notwithstanding any other provisions of this chapter, the compensation of persons presently employed by the City shall be according to the presently existing classification and pay scale until civil service regulations are adopted as provided in this charter after which all persons subject to the civil service regulations shall be employed and compensated in accordance with such regulations."

The Civil Service Commission did not formally approve a detailed set of regulations, including Regulation XIX, which dealt with classification of positions, pay scales, hours of work, holidays, vacation and sick leave, until December 30, 1952. Under said regulations, the appellants were continued in their 48-hour work week schedule. All other non-uniformed forces who were not already working a 40-hour week were then placed on a 40-hour work week basis; some were working 37½ hours per week. Some were working a 40-hour week by virtue of an agreement with a union (American Federation of Labor).

Appellants asserted that Regulation XIX, Supplemental Emergency Regulation A and Civil Service Regulations of December 30, 1952 were ineffective to repeal the ordinances of City Council of October 29, 1951 and January 2, 1952; that the regulations were contrary to Article 8, Section 7 of the Constitution of the Commonwealth, in that they were class legislation which granted special privileges to city employees other than policemen and park police; that the regulations violated the due process clause of the Fifth Amendment, and the equal protection clause of the Fourteenth Amendment of the Constitution of the United States; that the Regulations were arbitrary, unreasonable and capriciously discriminated against policemen and park police when they required them, as distinguished from other city employees, to work a longer work week without just compensation.

The Emergency Civil Service Regulations and Supplemental Regulation A were placed into immediate effect on January 7, 1952 upon the effective date of the Charter instead of being held in abeyance for 30 days as required by the Charter because of an alleged emergency affecting the public health and safety declared by the Mayor upon the suggestion of the Personnel Director and Civil Service Commission. The Regulations of December 30, 1952 were similarly placed into immediate effect.

Preliminary Objections to the complaint were dismissed. The Appellees then filed an answer asserting that

the Civil Service Regulations effectively repealed the ordinances of Council providing for a 40-hour week, that no appropriations were made by Council to pay for the 40-hour week, that Appellants were guilty of laches and that *O'Donnell v. City*, 385 Pa. 79, was res adjudicata of the issues. The defense of laches and res adjudicata were not alluded to by the Court below in its opinion. Appellants' motion for judgment on the pleadings was denied and the denial was affirmed by the Supreme Court of Pennsylvania (385 Pa. 424).

A trial by a judge without a jury resulted in a verdict for the appellees. Exceptions to the findings and conclusions of law were dismissed and judgment was entered for the appellees. The Supreme Court of Pennsylvania affirmed the judgment.

In affirming, the Supreme Court of Pennsylvania held that the Emergency Civil Service Regulations, Supplemental Regulation A and the Civil Service Regulation of December 30, 1952 were valid and effectively repealed the ordinances of Council of October 29, 1951 and January 2, 1952.

This appeal is based on the holding by the Supreme Court of Pennsylvania that the Emergency Civil Service Regulations, Supplemental Regulation A and the Civil Service Regulations of December 30, 1952 were legislative enactments which effectively repealed the ordinances of the City Council of Philadelphia which, by ordinance, fixed the work week at 40 hours for all city employees. The Supreme Court of Pennsylvania in *O'Donnell v. City*, 285 Pa. 79 (1956), upheld the validity of said ordinances, but only for a period of one week until the promulgation of the said regulations.

The Federal Questions Are Substantial

This question of discrimination as to hours of work and pay is of interest not only to the 5,000 police officers of the City of Philadelphia but to police officers all over the country. The police of Philadelphia in particular have established an outstanding record in the performance of their duties under the most trying conditions. Their plea that they should not be discriminated against in the matter of hours of work and pay and be treated like all other city employees is not unreasonable. It is simply a question of fair play.

The hours of work for police were reduced to 44 hours, then to 42 hours which presently prevail. Contrary to the Appellees' contention that the police, even if continued on a 40-hour work week, as all other city employees, they would have been required to work 48 hours weekly to maintain the same coverage and no appropriation for this overtime had been made by City Council, subsequent events have disproved the fallacious argument. No difficulty has been experienced in maintaining police coverage under the reduced work hours of 44 hours and 42 hours. The only exceptions have been in emergencies created by civil disorder which also occurred in many other urban areas. The overtime hours worked by the police in those emergencies were compensated by transfers, at the end of the year, of unexpended funds from other departments of the city. This practice was common before the new Charter went into effect and is common today.

In 1964 a total of $1,283,000 was transferred from unexpended funds of other departments to the police department for overtime services rendered by the police during emergencies. (Ordinance of City Council of City of Philadelphia approved December 8, 1964.) No appropriation had been made by City Council for this overtime in the municipal budget ordinance for that year.

In 1965, $200,000 was transferred by City Council from unexpended funds of other departments to the Police

Department for overtime personal services rendered by the police. City Council also transferred $502,500 from unexpended funds of other departments to the Police Department for materials, supplies and equipment (Ordinances of City Council approved June 17, 1965, December 1, 1965 and December 13, 1965). No previous appropriation for these purposes had been made by City Council in the budget ordinance for 1965.

Similarly, without prior containment in the budget ordinance of 1966, City Council transferred unexpended funds appropriated to various City Departments to the Police Department totalling $1,034,354, of which $932,854 were for personal services representing overtime pay.

(Ordinance of City Council approved December 22, 1966.)

On November 9, 1967, an ordinance was introduced in City Council transferring $247,500 from the Department of Public Property to the Police Department for overtime pay. Approval by City Council is expected. Additional funds will be needed for this purpose.

Had the police been continued on the 40-hour work week on January 7, 1952, any overtime, if necessary (and no necessity was proved by appellees for the years 1952-1963), could have been compensated by unexpended funds in the appropriation to the Police Department alone. If necessary, additional transfers from other departments could have been made as were made for the years 1964, 1965 and 1966. In addition, clear authority was contained in the Charter (Article II, Section 2-300 (6), Section 2-301 (a)), authorizing City Council to approve deficiency appropriations for the year 1952, the first year of operation under the new Charter.

Appellees' financial witness admitted, however, that if the police had continued to work a 40-hour week, the appropriations of Council were sufficient to pay for it. No transfers and no deficiency appropriation, except for emergencies, would have been required.

It is respectfully submitted that for all the foregoing reasons a hearing should be granted to appellants herein and permission given for the filing of further briefs and oral argument.

Respectfully submitted,

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